

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
PANAMA CITY DIVISION**

**RAMON ARMAS BORROTO, JR.,**

**Plaintiff,**

**vs.**

**Case No. 5:04cv165-RH/WCS**

**OFFICER McDONALD, et al.,**

**Defendants.**

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**ORDER**

This case is before the undersigned upon the *pro se* Plaintiff's filing of a response to Defendants' response to an earlier court order. Doc. 35. Previously, a report and recommendation had been entered on Defendants' motion to dismiss, doc. 24, but in light of Plaintiff's response, doc. 35, it appears that the report and recommendation should be vacated.

In Defendants' motion to dismiss, doc. 24, they asserted that Plaintiff had not exhausted administrative remedies. Plaintiff filed a response to that motion challenging Defendants' assertion. Doc. 29. Plaintiff claimed that he filed an emergency grievance directly to the Secretary, log number 02-12025, and said that although the subject was improperly listed as "discipline," it was his grievance concerning the alleged abuse at

issue in this case because he did not submit any other grievances during that period of time. *Id.* To consider Plaintiff's argument, Defendants were directed to provide a copy of the identified grievance appeal, doc. 32, which they did, doc. 33, and after reviewing the grievance, there was only one conclusion to be reached - the grievance was not the subject matter of this civil rights case (physical abuse), but concerned the subject matter properly listed on the grievance (discipline). Doc. 33, ex. A. Plaintiff's alleged in the grievance that officials at Washington C.I. were improperly "carrying over disciplinary confinement time that was assessed prior to [Plaintiff's] placement on Close Management." *Id.*

However, in Plaintiff's instant response, doc. 35, he alleges that he "filled out a DC6-303 formal grievance (emergency grievance) let his cellmate . . . read it, and placed it in the prisons internal mailing system to be mailed directly to the Secretary, of Florida Department of Corrections (F.D.O.C.) all in the presence of said cellmate David Blake Brooks." Plaintiff reported that four days later a "Captain John Doe" came to his cell and had the grievance in his hand. *Id.* That Captain questioned Plaintiff about the grievance and his allegations of physical abuse, and had a nurse examine Plaintiff for injuries. *Id.* Later that month, on December 19, 2002, Plaintiff states that Inspector Kraus from the Inspector General's Office interviewed Plaintiff and took a sworn statement from Plaintiff concerning the matter. *Id.* Following that interview, "Inspector Kraus had the plaintiff immediately transferred from Washington C.I. to Santa Rose C.I." *Id.* Indeed, Defendants' motion to dismiss corroborates that Plaintiff was transferred on December 19, 2002. Doc. 24, p. 3.

Plaintiff has consistently maintained in this case that he never received a response to his emergency grievance. *Id.* Plaintiff also states that he must have been mistaken about the date of his grievance and that he submitted at least two emergency grievances, one of which was obviously the grievance concerning the discipline and one was a grievance about the alleged physical abuse which is the subject matter of this civil rights case. Plaintiff argues that he put forth due diligence in attempting to exhaust his administrative remedies and that he should not be made to suffer when prison officials prevented him from using the grievance process. *Id.* Plaintiff further argues that his emergency grievances were interfered with by the John Doe Captain because under the prison rules, it should have gone directly to the Secretary's Office. *Id.*

If Plaintiff did indeed submit a grievance, even if it was not responded to by the Department, and if Plaintiff also alerted prison officials to his claim through an investigation by the Inspector General's Office, then it is not readily apparent that this case should be so quickly dismissed for failure to exhaust administrative remedies. The Department of Corrections' Administrative Rules provide that an inmate may submit three types of grievances directly to the Office of the Secretary: (1) an emergency<sup>1</sup> grievance; (2) grievance of reprisal; or (3) grievance of a sensitive nature. Rule 33-103.007(6)(a). Accepting Plaintiff's argument that his emergency grievances should have never ended up in the hands of an officer at Plaintiff's prison, it is not clear that Plaintiff's case should be dismissed if his efforts at exhaustion were prevented by prison

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<sup>1</sup> An "emergency grievance" is defined as "those matters which, if disposed of according to the regular time frames, would subject the inmate to substantial risk of personal injury or cause other serious and irreparable harm to the inmate." FLA. ADMIN. CODE R. 33-103.002(4).

officials. It is also difficult to dismiss this case if Plaintiff's claim was investigated by the Inspector General's Office despite the inability to demonstrate exhaustion through the usual procedures.

Dismissal of a complaint, or a portion thereof, pursuant to Fed.R.Civ.P. 12(b)(6) should not be ordered unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). A court must accept as true the allegations of the complaint when ruling upon such a motion. Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992)(citation omitted), *cert. denied*, 113 S.Ct. 1586 (1993). *Pro se* complaints should be held to less stringent standards than those drafted by an attorney. Wright v. Newsome, 795 F.2d 964, 967 (11th Cir. 1986), citing Haines v. Kerner, 404 U.S. 519, 520-521, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972).

Since passage of the PLRA, 42 U.S.C. § 1997e(a) provides: "*No action shall be brought* with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." (Emphasis added.) The exhaustion requirement of § 1997e(a) is mandatory, Alexander v. Hawk, 159 F.3d 1321, 1324-26 (11th Cir. 1998), yet prisoners have been found to have "exhausted" when administrative remedies are unavailable due to interference by prison officials. See Brock v. Kenton County, KY, 2004 WL 603929, at \*3 (6th Cir. Mar. 23, 2004), *citing* Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (holding that prisoner lacked available administrative remedy for exhaustion purposes where the prisoner was unable

to file a grievance because prison officials refused to provide him with the necessary grievance forms); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (finding allegations that prison officials failed to respond to his written requests for grievance forms were sufficient to raise an inference that the prisoner had exhausted his "available" administrative remedies); Arnold v. Goetz, 245 F.Supp.2d 527, 538-39 (S.D.N.Y. 2003) (finding a prisoner who was told that an inmate grievance process existed, but who was frustrated by officials in his attempts to learn how to use it, did not have recourse to an "available" administrative remedy); Davis v. Milwaukee Co., 225 F.Supp.2d 967, 976 (E.D.Wis. 2002) (holding that when the record established that the defendants interfered with the inmates ability to exhaust in three ways such grievance procedure might have been "unavailable").

Another provision of that statute provides that the Court should not dismiss an action unless "the court is satisfied that the action" fails to state a claim upon which relief can be granted. 42 U.S.C. § 1997e(c)(1). In this case, it is unclear upon this record that Plaintiff's claim is unexhausted. It does not appear "beyond doubt that Plaintiff can prove no set of facts" which could support his claims and assertions of exhaustion in accordance with the principles which support the exhaustion requirement.

To determine whether Plaintiff's case should go forward or not, Defendants will be required to provide to the Court and to Plaintiff all documents related to the Investigation conducted by the Inspector General's Office concerning Plaintiff. Furthermore, should review of this Investigation filed demonstrate that Plaintiff's transfer was related to the Investigation and his complaints of abuse by prison officials at Washington C.I., those documents relevant to the transfer shall also be provided. While

it is noted that this procedure is unusual when directed *sua sponte*, the Court will not dismiss a case unless satisfied that the complaint fails to state a claim upon which relief can be granted. 42 U.S.C. § 1997e(c)(1).

Accordingly, it is

**ORDERED:**

1. The report and recommendation, doc. 34, entered on March 17, 2005, is

**VACATED.**

2. Defendants shall have until **April 28, 2005**, in which to file a complete copy of the Inspector General's investigation relevant to Plaintiff's complaint as referenced in Plaintiff's response, doc. 35.

3. Should the documents relevant to the Investigation demonstrate that Plaintiff was transferred due at least in part to the investigation, Defendants shall also file the documents concerning Plaintiff's transfer on or before **April 28, 2005**.

4. The Clerk of Court shall return this file to the undersigned upon receipt of Defendants' response to this order or no later than April 28, 2005.

**DONE AND ORDERED** on March 28, 2005.

s/ William C. Sherrill, Jr.  
**WILLIAM C. SHERRILL, JR.**  
**UNITED STATES MAGISTRATE JUDGE**